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July 19, 2004

Ms. Anita Nazir
Judicial Council of California
Administrative Offices of the Court
455 Golden Gate Avenue
San Francisco, CA 94102

Dear Ms. Nazir:

Enclosed you will find the transmittal letter together with the report of the California State Bar Litigation Section in response to the revisions of CACI circulated for public comment in June 2004.

If you have any questions, please give me a call.

Sincerely yours,

Cooley Godward LLP

Paul A. Renne

PAR:dpm

Enclosures

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July 19, 2004

Honorable James D. Ward
Vice Chair
Judicial Council Task Force
on Jury Instructions
California Court of Appeals
Fourth Appellate District
3389 – 12th Street
Riverside, CA 92501

Re: California State Bar Litigation Section Comments on Judicial Council Task Force on Jury Instructions, Civil Jury Instructions, Proposed Revisions Circulated June 2004

Dear Justice Ward:

On behalf of the Litigation Section of the State Bar, we submit the attached report that contains comments on some of the proposed revisions to the California approved civil instructions ("CACI") prepared by the California Judicial Council's Task Force on Jury Instructions and circulated for comment on June 2004.

As we did with the initial draft and proposed revisions of CACI, we followed the same procedure to provide the views of experienced litigators who bring different perspectives from different practice areas, backgrounds and points of view with an attempt to achieve a balance between the perspective of plaintiffs and that of defendants. Following a series of telephone and email exchanges within the Litigation Section's Committee on Jury Instructions, the Jury Instruction Committee met as a whole to consider the draft reports received from various subgroups of that Committee. Following that meeting, a final draft was again circulated by email for further revisions and a final draft submitted to the Litigation Section Executive Committee for further review and approval. Following that Committee's review, I have been authorized on behalf of the Litigation Section Executive Committee to submit this report to the Judicial Council's Task Force for its consideration.

Our Committee continues to be impressed and appreciative of the continuing efforts of the Judicial Council to improve CACI and we look forward to assisting in the future when further revisions to those instructions are circulated for public comment.

Very truly yours,

Paul A. Renne

PAR:dpm

Enclosures

cc: William J. Caldarelli, Esq.
Committee on Jury Instructions
Star Babcock, Special Assistant to the executive Director of the State Bar of California
Lynn Hinegardener, Esq., Administrative Offices of Court, Office of the General Counsel
Ms. Anita Nazir, Judicial Council of California, Administrative Offices of the Court
Tom Pye, Litigation Section, The State Bar of California

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LITIGATION SECTION
THE STATE BAR OF CALIFORNIA

Need new comments

California State Bar Litigation Section Comments

Judicial Council Task Force on Jury Instructions

Civil Jury Instructions, Revised/New 2004

Committee on Jury Instructions
March 10, 2004

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INDEX OF COMMENTS OF THE STATE BAR LITIGATION EXECUTIVE COMMITTEE TO CERTAIN PROPOSED REVISIONS OF CACI

CONTRACTS

302. Contract Formation-Essential Factual Elements *(Revised 2004)*

[*Name of plaintiff*] claims that the parties entered into a contract. To prove that a contract was created, [*name of plaintiff*] must prove all of the following:

1 ~~1.~~ ~~That the parties were legally capable of entering into the contract;~~

~~2~~1. That the contract terms were clear enough that the parties could understand what each was required to do;

~~3. That the contract had a legal purpose;~~

42. That the parties agreed to give each other something of value. [A promise to do something or not to do something may have value]; and

~~5~~3. That the parties agreed to the terms of the contract.

[When you examine whether the parties agreed to the terms of the contract, ask yourself if, under the circumstances, a reasonable person would conclude, from the words and conduct of each party, that there was an agreement. You may not consider the parties' hidden intentions.]

If [*name of plaintiff*] did not prove all of the above, then a contract was not created.

Directions for Use

This instruction should only be given where the existence of a contract is contested. If both parties agree that they had a contract, then the instructions relating to whether or not a contract was actually formed would not need to be given. At other times, the parties may be contesting only a limited number of contract formation issues. Also, some of these issues may be decided by the judge as a matter of law. Users should omit elements in this instruction that are not contested so that the jury can focus on the contested issues. Read the bracketed paragraph only if element #53 is read.

The ~~terms~~ elements regarding ~~"legally capable"~~ legal capacity and ~~"~~legal purpose~~"~~ ~~may require further definition if~~ are omitted from this instruction because these issues are not likely to be before the jury. ~~However, the judge would most likely decide these two issues and so these issues could be deleted from the instruction before it is given to the jury.~~

The final element of this instruction would be given prior to instructions on offer and acceptance. If neither offer nor acceptance is contested, then this element of the instruction will not need to be given to the jury.

Sources and Authority

- Civil Code section 1550 provides:

  It is essential to the existence of a contract that there should be:

  1. Parties capable of contracting;
  2. Their consent;

3. A lawful object; and

4. A sufficient cause or consideration.

Capacity

- Civil Code section 1556 provides: "All persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights."

Lawful Object

- The issue of whether a contract is illegal or contrary to public policy is a question of law. (*Jackson v. Rogers & Wells* (1989) 210 Cal.App.3d 336, 350 [258 Cal.Rptr. 454].)

Certainty

- "In order for acceptance of a proposal to result in the formation of a contract, the proposal 'must be sufficiently definite, or must call for such definite terms in the acceptance, that the performance promised is reasonably certain.' [Citation.]" (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811 [71 Cal.Rptr.2d 265].)

- Section 33(1) of the Restatement Second of Contracts provides: "Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain." Section 33(2) provides: "The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy."

- Courts have stated that the issue of whether a contract is sufficiently definite is a question of law for the court. (*Ladas v. California State Automobile Assn.* (1993) 19 Cal.App.4th 761, 770, fn. 2; *Ersa Grae Corp. v. Fluor Corp.* (1991) 1 Cal.App.4th 613, 623 [2 Cal.Rptr.2d 288].)

Consideration

- Civil Code section 1605 defines "good consideration" as follows: "Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor is a good consideration for a promise."

- Civil Code section 1614 provides: "A written instrument is presumptive evidence of consideration." Civil Code section 1615 provides: "The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it."

- In *Rancho Santa Fe Pharmacy, Inc. v. Seyfert* (1990) 219 Cal.App.3d 875, 884 [268 Cal.Rptr. 505], the court concluded that the presumption of consideration in section 1614 goes to the burden of producing evidence, not the burden of proof.

- Lack of consideration is an affirmative defense and must be alleged in answer to the complaint. (*National Farm Workers Service Center, Inc. v. M. Caratan, Inc.* (1983) 146 Cal.App.3d 796, 808 [194 Cal.Rptr. 617]).

- "Consideration consists not only of benefit received by the promisor, but of detriment to the promisee. . . . 'It matters not from whom the consideration moves or to whom it goes.

If it is bargained for and given in exchange for the promise, the promise is not gratuitous.' " *(Flojo Internat., Inc. v. Lassleben* (1992) 4 Cal.App.4th 713, 719 [6 Cal.Rptr.2d 99], internal citation omitted.)

- "Consideration may be an act, forbearance, change in legal relations, or a promise." (1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 207.)

Mutual Consent

- Mutual consent is an essential contract element. (Civ. Code, § 1550.) Under Civil Code section 1565, "[t]he consent of the parties to a contract must be: 1. Free; 2. Mutual; and 3. Communicated by each to the other." Civil Code section 1580 provides, in part: "Consent is not mutual, unless the parties all agree upon the same thing in the same sense."

- California courts use the objective standard to determine mutual consent: "[A plaintiffs] uncommunicated subjective intent is not relevant. The existence of mutual assent is determined by objective criteria. The test is whether a reasonable person would, from the conduct of the parties, conclude that there was mutual agreement." *(Hilleary v. Garvin* (1987) 193 Cal.App.3d 322, 327 [238 Cal.Rptr. 247], internal citations omitted; see also *Roth v. Malson* (1998) 67 Cal.App.4th 552, 557 [79 Cal.Rptr.2d 226].)

- Actions as well as words are relevant: "The manifestation of assent to a contractual provision may be 'wholly or partly by written or spoken words or by other acts or by failure to act.' " *(Merced County Sheriff's Employees Assn. v. County of Merced* (1987) 188 Cal.App.3d 662, 670 [233 Cal.Rptr. 519] (quoting Rest. 2d Contracts, § 19).)

- The surrounding circumstances can also be relevant in determining whether a binding contract has been formed. *(California Food Service Corp., Inc. v. Great American Insurance Co.* (1982) 130 Cal.App.3d 892, 897 [182 Cal.Rptr. 67].) "If words are spoken under circumstances where it is obvious that neither party would be entitled to believe that the other intended a contract to result, there is no contract." *(Fowler v. Security-First National Bank* (1956) 146 Cal.App.2d 37, 47 [303 P.2d 565].)

Secondary Sources

1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 119-260, 332, 357, 364, 429, 430

13 California Forms of Pleading and Practice, Ch. 140, Contracts, §§ 140.10, 140.20-140.25 (Matthew Bender)

5 California Points and Authorities, Ch. 50, Contracts (Matthew Bender)

27 California Legal Forms, Ch. 75, Formation of Contracts and Standard Contractual Provisions, §§ 75.10, 75.11 (Matthew Bender)

GIVEN:

REFUSED:

MODIFIED:

WITHDRAWN:

_____

Judge

State Bar Committe Comments on Proposed Instruction No. 302.

The Committee agrees with the Council's proposed deletion of element 3 regarding legality of purpose of the contract. However, the Committee disagrees with the deletion of element 1 regarding legal capacity in all cases. Element 1 should remain in the instruction with a Direction for Use that it is only to be used when a question of fact is raised as to a parties capacity, such as a question as to "sound mind." See *Walton v. Bank of California National Association* (1963) 218 Cal.App. 527, 539-542; *Philbrook v.Howard* (1958) 157 Cal.App.2d 210,214; Civ. Code §1556.

Similarly, the Committee proposes that the Council retain element 2 with a Direction for Use this element should only be used if there is a question of fact as to certainty. Several cases have held that certainty of contract terms is a question of law for the court to decide. *Ladas v. California State Automobile Assn.* (1993) 19 Cal.App.4th 761,770, fn. 2; *Ersa Grae Corp. v. Fluor Corp.* (1991) 1 Cal.App.4th 613,623 and *Louis Lesser Enterprises, Ltd. v. Roeder* (1962) 209 Cal.App.2d 401,411.

CONTRACTS

337. Affirmative Defense-Novation *(Revised 2004)*

[*Name of defendant*] claims that the original contract with [*name of plaintiff*] cannot be enforced because the parties substituted a new and different contract for the original.

To succeed, [*name of defendant*] must prove that all parties agreed, by words or conduct, to cancel the original contract and to substitute a new contract in its place.

If you decide that [*name of defendant*] has proved this, then the original contract is not enforceable.

Directions for Use

If the contract in question is not the original contract, specify which contract it is instead of "original."

Although there is language in *Alexander v. Angel* (1951) 37 Cal.2d 856, 860-861 that could be read to suggest that a novation must be proved by the higher standard of clear and convincing proof, an examination of the history of that language and the cases upon which the language in *Angel* depends (*Columbia Casualty Co. v. Lewis* (1936) 14 Cal.App.2d 64, 72 and *Houghton v. Lawton* (1923) 63 Cal.App. 218, 223) demonstrates that the original use of the term "clear and convincing," carried forward thereafter without analysis, was intended only to convey the concept that a novation must clearly be shown and may not be presumed. The history of the language does not support a requirement that a party alleging a novation must prove there is a high probability (i.e., clear and convincing proof) that the parties agreed to a novation. See also, Restatement of the Law, Second, Contracts, §§ 279, 280. A party alleging a novation must prove that the facts supporting the novation are more like to be true than not true.

Sources and Authority

- Civil Code section 1530 provides: "Novation is the substitution of a new obligation for an existing one."
- Civil Code section 1531 provides:

  Novation is made:

  1. By the substitution of a new obligation between the same parties, with intent to extinguish the old obligation;
  2. By the substitution of a new debtor in place of the old one, with intent to release the latter; or,
  3. By the substitution of a new creditor in place of the old one, with intent to transfer the rights of the latter to the former.

- "A novation is a substitution, by agreement, of a new obligation for an existing one, with intent to extinguish the latter. A novation is subject to the general rules governing contracts and requires an intent to discharge the old contract, a mutual assent, and a consideration." (*Klepper v. Hoover* (1971) 21 Cal.App.3d 460, 463 [98 Cal.Rptr. 482].)
- Conduct may form the basis for a novation although there is no express writing or agreement. (*Silva v. Providence Hospital of Oakland* (1939) 14 Cal.2d 762, 773 [97 P.2d

798].)

- Novation is a question of fact, and the burden of proving it is upon the party asserting it. (*Alexander v. Angel* (1951) 37 Cal.2d 856, 860.)

- "When there is conflicting evidence the question whether the parties to an agreement entered into a modification or a novation is a question of fact." (*Howard v. County of Amador* (1990) 220 Cal.App.3d 962, 980 [269 Cal.Rptr. 807.)

- "The 'question whether a novation has taken place is always one of intention,' with the controlling factor being the intent of the obligee to effect a release of the original obligor on his obligation under the original agreement." (*Alexander, supra,* 37 Cal.2d at p. 860, internal citations omitted.)

- "[1]n order for there to be a valid novation, it is necessary that the parties intend that the rights and obligations of the new contract be substituted for the terms and conditions of the old contract." (*Wade v. Diamond A Cattle Co.* (1975) 44 Cal.App.3d 453, 457 [118 Cal.Rptr. 695].)

- "While the evidence in support of a novation must be 'clear and convincing,' the 'whole question is one of fact and depends upon all the facts and circumstance of the particular case,' with the weight and sufficiency of the proof being matters for the determination of the trier of the facts under the general rules applicable to civil actions." (*Alexander, supra,* 37 Cal.2d at pp. 860-861, internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 906-908

13 CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 140, Contracts, § 140.141 (Matthew Bender)

5 CALIFORNIA POINTS AND AUTHORITIES, Ch. 50, Contracts, §§ 50.450-50.464 (Matthew Bender)

27 CALIFORNIA LEGAL FORMS, Ch. 77, Discharge of Obligations, §§ 77.20, 77.280-77.282 (Matthew Bender)

GIVEN:

REFUSED:

MODIFIED:

WITHDRAWN:

_____
Judge

State Bar Committee's Comments on Proposed Instruction No. 337

The Committee questions the accuracy of the Direction for Use revision which adds language asserting that the "clear and convincing" evidence standard does not apply. Recent cases citing *Alexander v. Angel* (1951) 37 Cal.2d 856,860, the case upon which the Council relies in support of its Directions for Use, suggest that the "clear and convincing" standard does apply to the

novation defense, see *Wells Fargo Bank v. Bank of America* (1995) 32 Cal.App.4th 424.432 and *Howard v. County of Amador* (1990) 220 Cal.App.3d 962, 977; *Davies Machinery Co. v. Pine Mountain Club, Inc.* (1974) 39 Cal.App.3d 18,25. In addition, Jefferson's *California Evidence Benchbook* concludes that the clear and convincing proof standard applies. We recommend that the Direction for Use should recite the clear and convincing standard unless changed by the Supreme Court.

CONTRACTS

VF-303. Breach of Contract-Contract Formation at Issue (New 2004)

We answer the questions submitted to us as follows:

1. Were the contract terms clear enough so that the parties could understand what each was required to do?

   Yes ____ No ____

   If your answer to question 1 is yes, then answer question 2. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

2. Did the parties agree to give each other something of value?

   Yes ____ No ____

   If your answer to question 2 is yes, then answer question 3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

3. Did the parties agree to the terms of the contract?

   Yes ____ No ____

   If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. Did [*name of plaintiff*] do all, or substantially all, of the significant things that the contract required [him/her/it] to do?

   Yes ____ No ____

   If your answer to question 4 is yes, then skip question 5 and answer question 6. If you answered no, answer question 5.

5. Was [*name of plaintiff*] excused from having to do all, or substantially all, of the significant things that the contract required [him/her/it] to do?

   Yes ____ No ____

   If your answer to question 5 is yes, then answer question 6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

6. Did all the conditions occur that were required for [*name of defendant*]'s performance?

   Yes ____ No ____

   If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Did [*name of defendant*] fail to do something that the contract required [him/her/it] to do?

   Yes ____ No ____

If your answer to question 7 is yes, then answer question 8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

8 Was [*name of plaintiff*] harmed by that failure?

Yes ____ No ____

If your answer to question 8 is yes, then answer question 9. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

9. What are [*name of plaintiff*]'s damages?

[a. Past economic loss: $_____]

[b. Future economic loss: $_____]

TOTAL $_____

Signed:_____

Presiding Juror

Dated:_____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

Directions for Use

The special-verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on Instruction 302, *Contract Formation Essential Factual Elements,* and Instruction 303, *Breach of Contract-Essential Factual Elements.* The elements concerning the parties' legal capacity and legal purpose will likely not be issues for the jury. If the jury is needed to make a factual determination regarding these issues, appropriate questions may be added to this verdict form.

If specificity is not required, users do not have to itemize all the damages listed in question 9. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

If there are multiple causes of action, users may wish to combine the individual forms into one form.

GIVEN:

REFUSED:

MODIFIED:

WITHDRAWN:

_____

Judge

State Bar Committee's Comments on Proposed Verdict Form 303.

Consistent with our comments on Proposed Jury Instruction 302, question 1 should only be asked if there is a factual dispute as to the certainty of the terms of the contract which cannot be resolved as a matter of law. Similarly, in an appropriate case the jury should be asked to determine whether or not a party had the legal capacity to enter into the contract.

NEGLIGENCE

430. Causation: Substantial Factor *(Revised 2004)*

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. [Conduct does not "contribute" to the harm if the same harm would have occurred without such conduct.] It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.

Directions for Use

As phrased, this definition of "substantial factor" subsumes the "but for" test of causation, e.g., plaintiff must prove that but for defendant's conduct, the same harm would not have occurred. (See *Viner v. Sweet* (2003) 30 Cal.4th 1232, 1239-1240 [135 Cal.Rptr.2d 629].) The first sentence of the instruction accounts for the "but for" concept. Conduct does not "contribute" to harm if the same harm would have occurred without such conduct. "Conduct," in this context, refers to the culpable acts or omissions on which a claim of legal fault is based, e.g., negligence, product defect, breach of contract, dangerous condition of public property.

The "but for" test does not apply to concurrent independent causes, which are multiple forces operating at the same time and independently, each of which would have been sufficient by itself to bring about the same harm. (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1049 [1 Cal. Rptr. 2d 913, 819 P.2d 872].) For instruction on multiple causes, see Instruction 431 (Causation: Multiple Causes).

In asbestos-related cancer cases, *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 977 [67 Cal.Rptr.2d 16, 941 P.2d 1203] requires an additional instruction regarding exposure to a particular product. See Instruction 435, Causation for Asbestos-Related Cancer Claims.

Tentative Draft No. 3 (April 7, 2003) for the Restatement Third of Torts, in its treatment of Torts: Liability for Physical Harm (Basic Principles), section 29, proposes a "scope of liability" approach that de-emphasizes causation and focuses on (1) the nature of the harms that are within the scope of the risk created by the actor's conduct and (2) whether those harms resulted from the risk; this Restatement is not final, and it has not been subject to California judicial review.

Sources and Authority

- *Bockrath v. Aldrich Chemical Co., Inc.* (1999) 21 Cal.4th 71, 79 [86 Cal.Rptr.2d 846, 980 P.2d 398]; *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953 [67 Cal.Rptr.2d 16, 941 P.2d 1203]; *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041 [1 Cal.Rptr.2d 913, 819 P.2d 872].
- "However the test is phrased, causation in fact is ultimately a matter of probability and common sense." (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 253 [7 Cal.Rptr.2d 101], relying on Rest.2d of Torts, § 433B, com. b.)
- *Espinosa v. Little Company of Mary Hospital* (1995) 31 Cal.App.4th 1304, 1313-1314 [37 Cal.Rptr.2d 541].
- Restatement Second of Torts, section 431, provides: "The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and, (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm." This section "correctly states California law as to the issue of causation in tort cases." (*Wilson v. Blue Cross of Southern*

California (1990) 222 Cal.App.3d 660, 673 [271 Cal.Rptr. 876].)

- This instruction incorporates Restatement Second of Torts, section 431, comment a, which provides, in part: "The word 'substantial' is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called 'philosophic sense' which includes every one of the great number of events without which any happening would not have occurred."

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 968, pp. 358-359, id. (2002 supp.) Torts, § 968A, pp. 253-256

1 Levy et al., California Torts, Ch. 2, Causation, § 2.02 (Matthew Bender) California Tort Guide (Cont.Ed.Bar 1996) §§ 1.13-1.15

4 California Trial Guide, Unit 90, Closing Argument, § 90.89 (Matthew Bender)

California Products Liability Actions, Ch. 2, Liability for Defective Products, § 2.22, Ch. 7, Proof, § 7.06 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, Negligence (Matthew Bender)

16 California Points and Authorities, Ch. 165, Negligence, §§ 165.260-165.263 (Matthew Bender)

GIVEN:

REFUSED:

MODIFIED:

WITHDRAWN:

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Judge

State Bar Committee's Comments on Proposed Instruction No. 430

The Committee believes that the "but for" test should be incorporates into the instruction itself and deleted in the Direction for Use, with a note that the bracketed sentence should not be used if there are concurrent independent causes.

In addition, the Committee believes that the last sentence of the Direction for Use should be in a separate paragraph since it introduces the new subject of independent causes and should cross-reference to Instructions No. 431 on multiple causes.

MEDICAL NEGLIGENCE

501. Standard of Care for Health Care Professionals *(Revised 2004)*

A [*insert type of medical practitioner*] is negligent if [he/she] fails to ~~exercise~~ use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful [*insert type of medical practitioners*] would ~~possess and~~ use in similar circumstances.

~~[When you are deciding whether [*name of defendant*] was negligent, y~~You must determine the level of skill, knowledge, and care that other reasonably careful [*insert type of medical practitioners*] would use in similar circumstances based ~~your decision only~~ on the testimony of the expert witnesses [including [*name of defendant*]] who have testified in this case.]

Directions for Use

This instruction is intended to apply to nonspecialist physicians, surgeons, and dentists. The standards of care for nurses, specialists, and hospitals are addressed in separate instructions.

The second paragraph should be used except in cases where the court determines that expert testimony is not necessary to establish the standard of care.

See Instructions 219-221 on evaluating the credibility of expert witnesses. Sources and Authority

- "With unimportant variations in phrasing, we have consistently held that a physician is required to possess and exercise, in both diagnosis and treatment, that reasonable degree of knowledge and skill which is ordinarily possessed and exercised by other members of his profession in similar circumstances." (*Landeros v. Flood* (1976) 17 Cal.3d 399, 408 [131 Cal.Rptr. 69, 551 P.2d 389]; see also *Brown v. Colm* (1974) 11 Cal.3d 639, 642-643 [114 Cal.Rptr. 128, 552 P.2d 688].)
- "The courts require only that physicians and surgeons exercise in diagnosis and treatment that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of the medical profession under similar circumstances." (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 36 [210 Cal.Rptr. 762, 694 P.2d 1134].)
- In *Hinson v. Clairemont Community Hospital* (1990) 218 Cal.App.3d 1110, 1119-1 120 [267 Cal.Rptr. 503] (disapproved on other grounds in *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1228 [23 Cal.Rptr.2d 397, 859 P.2d 96]), the court observed that failure to possess the requisite level of knowledge and skill is negligence, although a breach of this portion of the standard of care does not, by itself, establish actionable malpractice.
- "The standard of care against which the acts of a medical practitioner are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony, unless the conduct required by the particular circumstances is within the common knowledge of laymen." (*Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 215 [6 Cal.Rptr.2d 900].)
- " 'Ordinarily, the standard of care required of a doctor, and whether he exercised such care, can be established only by the testimony of experts in the field." But to that rule there is an exception that is as well settled as the rule itself, and that is where "negligence on the part of a doctor is demonstrated by facts which can be evaluated by resort to common knowledge, expert testimony is not required since scientific enlightenment is not essential for the determination of an obvious fact." ' " (*Gannon v. Elliot* (1993) 19 Cal.App.4th 1, 6 [23 Cal.Rptr.2d 86], internal citations omitted.)

- "We have already held upon authority that the failure to remove a sponge from the abdomen of a patient is negligence of the ordinary type and that it does not involve knowledge of materia medica or surgery but that it belongs to that class of mental lapses which frequently occur in the usual routine of business and commerce, and in the multitude of commonplace affairs which come within the group of ordinary actionable negligence. The layman needs no scientific enlightenment to see at once that the omission can be accounted for on no other theory than that someone has committed actionable negligence." (*Ales v. Ryan* (1936) 8 Cal.2d 82, 93 [64 P.2d 409].)

- The medical malpractice standard of care applies to veterinarians. (*Williamson v. Prida* (1999) 75 Cal.App.4th 1417, 1425 [89 Cal.Rptr.2d 868].)

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 774, 792, pp. 113, 137

3 Levy et al., California Torts, Ch. 30, General Principles of Liability of Professionals, § 30.12, Ch. 31, Liability of Physicians and Other Medical Practitioners, § 31.11 (Matthew Bender)

California Tort Guide (Cont.Ed.Bar 1996) § 9.1

17 California Forms of Pleading and Practice, Ch. 209, Dentists, § 209.42 (Matthew Bender)

25 California Forms of Pleading and Practice, Ch. 295, Hospitals, §§ 295.13, 295.43, 295.45 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 414, Physicians and Other Medical Personnel (Matthew Bender)

17 California Points and Authorities, Ch. 175, Physicians and Surgeons (Matthew Bender)

GIVEN:

REFUSED:

MODIFIED:

WITHDRAWN:

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Judge

State Bar Committee's Comments on Proposed Instruction No. 501.

Although the Committee believes that the Proposed Revisions improve the language of CACI No. 501, we raise the question whether, as worded both the old and the revised instruction potentially invades the province of the jury. The credibility of a witness, even an expert, is still a jury issue and this instruction would appear to be telling the jury that they have to ignore evidence going to a witness' credibility when determining the standard of care. The Committee recommends that the word "only" be deleted.

MEDICAL NEGLIGENCE

502. Standard of Care for Medical Specialists *(Revised 2004)*

A [*insert type of medical specialist*] is negligent if [he/she] fails to ~~exercise~~ use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful [*insert type of medical specialists*] would ~~possess and~~ use in similar circumstances.

[~~When you are deciding whether [*name of defendant*] was negligent, y~~You must determine the level of skill, knowledge, and care that other reasonably careful [*insert type of medical specialists*] would use in similar circumstances based ~~your decision only~~ on the testimony of the expert witnesses [including [*name of defendant*]] who have testified in this case.]

Directions for Use

This instruction is intended to apply to physicians, surgeons, and dentists who are specialists in a particular practice area.

The second paragraph should be used except in cases where the court determines that expert testimony is not necessary to establish the standard of care.

See Instructions 219-221 on evaluating the credibility of expert witnesses.

Sources and Authority

- Specialists, such as anesthesiologists and ophthalmologists, are "held to that standard of learning and skill normally possessed by such specialists in the same or similar locality under the same or similar circumstances." (*Quintal v. Laurel Grove Hospital* (1964) 62 Cal.2d 154, 159-160 [41 Cal.Rptr. 577, 397 P.2d 161].) This standard adds a further level to the general standard of care for medical professionals: "In the first place, the special obligation of the professional is exemplified by his duty not merely to perform his work with ordinary care but to use the skill, prudence, and diligence commonly exercised by practitioners of his profession. If he further specializes within the profession, he must meet the standards of knowledge and skill of such specialists." (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 188 [98 Cal.Rptr. 837, 491 P.2d 421].)

- California imposes a "higher standard of care upon physicians with a specialized practice." (*Neel, supra*, 6 Cal.3d 176 at p. 188, fn. 22.) This higher standard refers to the level of skill that must be exercised, not to the standard of care. (*Valentine v. Kaiser Foundation Hospitals* (1961) 194 Cal.App.2d 282, 294 [15 Cal.Rptr. 26] (disapproved on other grounds by *Siverson v. Weber* (1962) 57 Cal.2d 834, 839 [22 Cal.Rptr. 337, 372 P.2d 97]).)

- Psychotherapists are considered specialists in their field. (*Tarasoff v. Regents of Univ. of California* (1976) 17 Cal.3d 425, 438 [131 Cal.Rptr. 14, 551 P.2d 334]; *Kockelman v. Segal* (1998) 61 Cal.App.4th 491, 505 [71 Cal.Rptr.2d 552].)

Secondary Sources

3 Levy et al., California Torts, Ch. 30, General Principles of Liability of Professionals, § 30.12 (Matthew Bender)

California Tort Guide (Cont.Ed.Bar 1996) § 9.2

36 California Forms of Pleading and Practice, Ch. 414, Physicians and Other Medical Personnel

(Matthew Bender)

GIVEN:

REFUSED:

MODIFIED:

WITHDRAWN:

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Judge

State Bar Committee's Comments on Proposed Instruction No. 502

See Comments as to Proposed Instruction No. 501

MEDICAL NEGLIGENCE

504. Standard of Care for Nurses *(Revised 2004)*

A [*insert type of nurse*] is negligent if [he/she] fails to a ~~,exercise~~ use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful [*insert type of nurses*] would possess and use in similar circumstances.

[~~When you are deciding whether [*name of defendant*] was negligent, y~~You must determine the level of skill, knowledge, and care that other reasonably careful [*insert type of nurses*] would use in similar circumstances based ~~your decision only~~ on the testimony of the expert witnesses [including [*name of defendant*]] who have testified in this case.]

Directions for Use

The appropriate level of nurse should be inserted where indicated-i.e., registered nurse, licensed vocational nurse, nurse practitioner: "Today's nurses are held to strict professional standards of knowledge and performance, although there are still varying levels of competence relating to education and experience." (*Fraijo v. Hartland Hospital* (1979) 99 Cal.App.3d 331, 342 [160 Cal.Rptr. 246].)

The second paragraph should be used except in cases where the court determines that expert testimony is not necessary to establish the standard of care.

Sources and Authority

- "The adequacy of a nurse's performance is tested with reference to the performance of the other nurses, just as is the case with doctors." (*Frayo, supra,* 99 Cal.App.3d at p. 341.)
- Courts have held that "a nurse's conduct must not be measured by the standard of care required of a physician or surgeon, but by that of other nurses in the same or similar locality and under similar circumstances." (*Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 215 [6 Cal.Rptr.2d 900].)
- The jury should not be instructed that the standard of care for a nurse practitioner must be measured by the standard of care for a physician or surgeon when the nurse is examining a patient or making a diagnosis. (*Fein v. Permanente Medical Group* (1985) 38 Cal.3d 137, 150 [211 Cal.Rptr. 368, 695 P.2d 665].) Courts have observed that nurses are trained, "but to a lesser degree than a physician, in the recognition of the symptoms of diseases and injuries." (*Cooper v. National Motor Bearing Co.* (1955) 136 Cal.App.2d 229, 238 [288 P.2d 581].)

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 804, p. 155

California Tort Guide (Cont.Ed.Bar 1996) § 9.52

36 California Forms of Pleading and Practice, Ch. 414, Physicians and Other Medical Personnel (Matthew Bender)

17 California Points and Authorities, Ch. 175, Physicians and Surgeons (Matthew Bender)

GIVEN:

REFUSED:

MODIFIED:

WITHDRAWN:

_____

Judge

State Bar Committee's Comments on Proposed Instruction No. 503.

See comments to Proposed Instruction No. 501.

PROFESSIONAL NEGLIGENCE

600. Standard of Care *(Revised 2004)*

A [*insert type of professional*] is negligent if [he/she] fails to use the skill and care that a reasonably careful [*insert type of professional*] would have used in similar circumstances.

[~~When you are deciding whether [*name of defendant*] was negligent, y~~You must determine the level of skill, knowledge, and care that other reasonably careful [*insert type of professionals*] would use in similar circumstances based ~~your decision only~~ on the testimony of the expert witnesses [including [*name of defendant*]] who have testified in this case.]

Directions for Use

See Instruction 400, *Essential Factual Elements (Negligence)* for an instruction on the plaintiffs burden of proof. In legal or other nonmedical professional malpractice cases, the word "legal" or "professional" should be added before the word "negligence" in the first paragraph of Instruction 400. (See Sources and Authority following Instruction 500, *Essential Factual Elements (Medical Negligence)*.)

The second paragraph should be used except in cases where the court determines that expert testimony is not necessary.

See Instructions 219-221 on evaluating the credibility of expert witnesses.

If the defendant is a specialist in his or her field, this instruction should be modified to reflect that the defendant is held to the standard of care of a specialist. (*Wright v. Williams* (1975) 47 Cal.App.3d 802, 810 [121 Cal.Rptr. 194].) The standard of care for claims related to a specialist's expertise is determined by expert testimony. (*Id.* at pp. 810-811.)

Whether an attorney-client relationship exists is a question of law. (*Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1733 [20 Cal.Rptr.2d 756].) If the evidence bearing upon this decision is in conflict, preliminary factual determinations are necessary. (*Ibid.*) Special instructions may need to be crafted for that purpose.

Sources and Authority

- The elements of a cause of action in tort for professional negligence are: "(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433]; *Carlton v. Quint* (2000) 77 Cal.App.4th 690, 699 [91 Cal.Rptr.2d 844].)

- "It is well settled that an attorney is liable for malpractice when his negligent investigation, advice, or conduct of the client's affairs results in loss of the client's meritorious claim." (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 900 [218 Cal.Rptr. 313, 705 P.2d 886].)

- Attorneys fall below the standard of care for attorney malpractice if "their advice and actions were so legally deficient when given that it demonstrates a failure to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in performing the tasks they undertake." (*Unigard Insurance Group v. O'Flaherty & Belgum* (1995) 38 Cal.App.4th 1229, 1237 [45 Cal.Rptr.2d 565]; see also

Lucas v. Hamm (1961) 56 Cal.2d 583, 591- 592 [15 Cal.Rptr. 821, 364 P.2d 685], cert. denied, 368 U.S. 987.)

- Rules of Professional Conduct, Rule 3-110 (Failing to Act Competently) provides:

  (A) A member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.

  (B) For purposes of this rule, "competence" in any legal service shall mean to apply the 1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.

  (C) If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required.

- Lawyers who hold themselves out as specialists "must exercise the skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field." (*Wright, supra*, 47 Cal.App.3d at p. 810.) The standard of care for claims related to a specialist's expertise is determined by expert testimony. (*Id.* at pp. 810-811.)

- If the failure to exercise due care is so clear that a trier of fact may find professional negligence without expert assistance, then expert testimony is not required: " 'In other words, if the attorney's negligence is readily apparent from the facts of the case, then the testimony of an expert may not be necessary.' " (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1093 [41 Cal.Rptr.2d 768] [internal citations omitted].)

Secondary Sources

1 Witkin, California Procedure (4th ed. 1996) Attorneys, §§ 315-318, pp. 385-387

6 Witkin, Summary of California Law (9th ed. 1988), Torts, §§ 804-805, pp. 155-160

1 Levy et al., California Torts, Ch. 1, Negligence: Duty and Breach, § 1.31 (Matthew Bender)

3 Levy et al., California Torts, Ch. 30, General Principles of Liability of Professionals, §§ 30.12, 30.13, Ch. 32, Liability of Attorneys, § 32.13 (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, Attorney Professional Liability, Ch. 380, Negligence (Matthew Bender)

2 California Points and Authorities, Ch. 24, Attorneys at Law (Matthew Bender)

GIVEN:

REFUSED:

MODIFIED:

WITHDRAWN:

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Judge

State Bar Committee's Comments on Proposed Instruction No. 600

See comments to Proposed Instruction No. 501.

PRODUCTS LIABILITY

1223. Negligence (Recall/Retrofit) (*Revised 2004*)

[*Name of plaintiff*] claims that *[name of defendant]* was negligent because [he/she/it] failed to [recall/retrofit] the [product]. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of defendant]* [manufactured/ distributed/sold] the [product];

2. That *[name of defendant]* knew or reasonably should have known that the [product] was dangerous or was likely to be dangerous when used in a reasonably foreseeable manner;

3. That *[name of defendant]* ~~became~~was aware of this defect after the [product] was sold, but prior to *[name of plaintiff's]* injury.

4. That *[name of defendant]* failed to initiate a [recall/retrofit] ~~[or warn of the danger of]~~/warning] program that would have been reasonable uder the circumstances in light of the nature of the ~~[product]~~product and how it is used, its mode of distribution, the age and cost of the product, and the relative costs and benefits of such a [recall,retrofit/warning] program;

5. That a reasonable [manufacturer/distributor/ seller] under the same or similar circumstances would have instituted a ~~[recalled/retrofitted] the [product]~~retrofit/warning] program;

6. That *[name of plaintiff]* was harmed; and

7. That [*name of defendant*]'s failure to institute a [recall/retrofit]/warning] program for the [product] was a substantial factor in causing [*name of plaintiff*]'s harm.

~~A product manufacturer or supplier that knows of a dangerous defect in a previously sold product is required to use reasonable care under the circumstances. In deciding whether *[name of defendant]* used reasonable care, you should consider, among other factors, the following:~~

~~(a) Whether *[name of defendant]* provided an adequate warning of the *[product]*'s danger;~~

~~(b) Whether *[name of defendant]* recalled the *[product]*; and~~

~~(c) Whether [name of defendant] corrected the defect in the *[product]*; and~~

~~(d) [insert other applicable factor].~~

Directions for Use

If the issue concerns a negligently conducted recall, modify this instruction accordingly.

- "Failure to conduct an adequate retrofit campaign may constitute negligence apart from the issue of defective design." (*Hernandez v. Badger Construction Equipment Co.* (1994) 28 Cal.App.4th 1791, 1827 [34 Cal.Rptr.2d 732], internal citation omitted.)

- In *Lunghi v. Clark Equipment Co.* (1984) 153 Cal.App.3d 485 [200 Cal.Rptr. 387], the court observed that, where the evidence showed that the manufacturer became aware of dangers after the product had been on the market, the jury "could still have found that Clark's knowledge of the injuries caused by these features imposed a duty to warn of the

danger, and/or a duty to conduct an adequate retrofit campaign." The failure to meet the standard of reasonable care with regard to either of these duties could have supported a finding of negligence. (*Id.* at p. 494.)

- In *Balido v. Improved Machinery, Inc.* (1972) 29 Cal.App.3d 633 [105 Cal.Rptr. 890] (disapproved on other grounds in *Regents of University of California v. Hartford Accident & Indemnity Co.* (1978) 21 Cal.3d 624, 641-642 [147 Cal.Rptr. 486, 581 P.2d 197]), the court concluded that a jury could reasonably have found negligence based upon the manufacturer's failure to retrofit equipment determined to be unsafe after it was sold, even though the manufacturer told the equipment's owners of the safety problems and offered to correct those problems for $500. (Id. at p. 649.)

- If a customer fails to comply with a recall notice, this will not automatically absolve the manufacturer from liability: "A manufacturer cannot delegate responsibility for the safety of its product to dealers, much less purchasers." (*Springmeyer v. Ford Motor Co.* (1998) 60 Cal.App.4th 1541, 1562-1563 [71 Cal.Rptr.2d 190], internal citations omitted.)

GIVEN:

REFUSED:

MODIFIED:

WITHDRAWN:

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Judge

State Bar Committee's Comments on Proposed Instruction No. 1223.

The Committee recommends that the word "was" be substituted for "became" in Element 3 and that the phrase "but prior to *[name of plaintiff]* injury be added. With the use of the word "became" a manufacturer who was aware at the time of distribution technically would not be liable under this revised instruction and, if it is the fact of plaintiff's injury that causes a manufacturer to become aware of the.

The Committee also recommends additional language in Elements 4, 5 and 7 to more correctly and fully state the law in this area.

FRAUD OR DECEIT

1901. Concealment (*Revised 2004*)

[Name of plaintiff] claims that [he/she] was harmed because *[name of defendant]* concealed certain information. To establish this claim, *[name of plaintiff]* must prove all of the following:

[1. (a) That *[name of defendant]* and *[name of plaintiff]* were [*insert type of fiduciary relationship, e.g., "business partners"*]; and

(b) That *[name of defendant]* intentionally failed to disclose an important fact to *[name of plaintiff]*;]

[or]

[1. That *[name of defendant]* disclosed some facts to *[name of plaintiff]* but intentionally failed to disclose [other/another] important fact(s), making the disclosure deceptive;]

[or]

[1. That *[name of defendant]* intentionally failed to disclose an important fact that was known only to [him/her/it] and that *[name of plaintiff]* could not have discovered;]

[or]

[1. That *[name of defendant]* actively concealed an important fact from *[name of plaintiff]* or prevented [him/her/it] from discovering that fact;]

2. That *[name of plaintiff]* did not know of the concealed fact;

3. That *[name of defendant]* intended to deceive [*name of plaintiff*] by concealing the fact;

4. That *[name of plaintiff]* reasonably relied on *[name of defendant]*'s deception;

5. That *[name of plaintiff]* was harmed; and

6. That *[name of defendant]*'s concealment was a substantial factor in causing *[name of plaintiff]*'s harm.

Directions for Use

Under the second, third, and fourth bracketed instructions under element 1, if the defendant asserts that there was no relationship based on a transaction giving rise to a duty to disclose, separate and apart from any alleged fiduciary relationship, then the jury should also be instructed to determine whether the requisite relationship existed. ~~Regarding the fourth bracketed instruction, the parties may wish to research whether active concealment alone is sufficient to support a cause of action for fraud in tort, or whether it is merely grounds for voiding a contract under Civil Code section 1572 (see *Williams v. Graham* (1948) 83 Cal.App.2d 649, 652 [189 P.2d 324].)~~ See *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336-337.

Element 2 may be deleted if the third alternative bracketed instruction under element 1 is used.

Sources and Authority

- Civil Code section 1710 specifies four kinds of deceit. This instruction is derived from the third kind:

  A deceit, within the meaning of [section 1709], is either:

  1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

  2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be;

  3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or,

  4. A promise, made without any intention of performing it.

- "[T]he elements of an action for fraud and deceit based on a concealment are: (1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage." (*Marketing West, Inc. v. Sanyo Fisher (USA) Corp.* (1992) 6 Cal.App.4th 603, 612-613 [7 Cal.Rptr.2d 859].)

- "There are 'four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts. ... Each of the [three nonfiduciary] circumstances in which nondisclosure may be actionable presupposes the existence of some other relationship between the plaintiff and defendant in which a duty to disclose can arise. [¶] ... [S]uch a relationship can only come into being as a result of some sort of transaction between the parties. ... Thus, a duty to disclose may arise from the relationship between seller and buyer, employer and prospective employee, doctor and patient, or parties entering into any kind of contractual agreement.' All of these relationships are created by transactions between parties from which a duty to disclose facts material to the transaction arises under certain circumstances." (*LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336-337 [60 Cal.Rptr.2d 539], internal citations, italics, and footnote omitted.)

- "Ordinarily, failure to disclose material facts is not actionable fraud unless there is some fiduciary relationship giving rise to a duty to disclose ... [however,] '[t]he duty to disclose may arise without any confidential relationship where the defendant alone has knowledge of material facts which are not accessible to the plaintiff.' " (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 482 [55 Cal.Rptr.2d 225] internal citations omitted.)

- "In transactions which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably discoverable by the plaintiff; (3) the defendant actively conceals discovery from the

plaintiff." (*Warner Construction Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 294 [85 Cal.Rptr. 444], footnotes omitted.)

- "[A]ctive concealment of facts and mere nondisclosure of facts may under certain circumstances be actionable without [a fiduciary or confidential] relationship. For example, a duty to disclose may arise without a confidential or fiduciary relationship where the defendant, a real estate agent or broker, alone has knowledge of material facts which are not accessible to the plaintiff, a buyer of real property." (*La Jolla Village Homeowners' Assn. v. Superior Court* (1989) 212 Cal.App.3d 1131, 1151 [261 Cal.Rptr. 146], internal citations omitted.)

- "Even if a fiduciary relationship is not involved, a non-disclosure claim arises when the defendant makes representations but fails to disclose additional facts which materially qualify the facts disclosed, or which render the disclosure likely to mislead." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 666 [51 Cal.Rptr.2d 907], internal citations omitted.)

- " '[T]he rule has long been settled in this state that although one may be under no duty to speak as to a matter, "if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells but also not to suppress or conceal any facts within his knowledge which materially qualify those stated. If he speaks at all he must make a full and fair disclosure." ' " (*Marketing West, Inc., supra*, 6 Cal.App.4th at p. 613, internal citation omitted.)

- "Contrary to plaintiffs' assertion, it is not logically impossible to prove reliance on an omission. One need only prove that, had the omitted information been disclosed, one would have been aware of it and behaved differently." (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1093 [23 Cal.Rptr.2d 101].)

Secondary Sources

5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 697-703

3 Levy, et al., California Torts (1985-2000) Fraud and Deceit and Other Business Torts, § 40.03[2][b]

CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 269, Fraud and Deceit (Matthew Bender)

CALIFORNIA POINTS AND AUTHORITIES, Ch. 105, Fraud and Deceit (Matthew Bender) 2 Bancroft-Whitney's California Civil Practice (1992) Torts, § 22:16

GIVEN:

REFUSED:

MODIFIED:

WITHDRAWN:

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Judge

State Bar Committee's Comments on Proposed Instruction No. 1901

The proposed instruction number 1901 suffers from two defects.

First, the proposed new sentence in the "Directions for Use" should be deleted. The case cited, *Williams v. Graham* (1948) 83 Cal. App. 2d 649, 652, does not create any uncertainty regarding remedy available to a party wronged due to active concealment. To the contrary, the Court in *Williams* held that the plaintiff was entitled to tort remedies pursuant to Civil Code section 3343, writing, "Section 3343 permits the recovery not only of damages suffered by the loss of the bargain but of any other loss arising from the transaction. *Rothstein v. Janss Inv. Corp.*, 45 Cal.App.2d 64, 73, 113 P.2d 465; *Jacobs v. Levin*, 58 Cal.App.2d Supp. 913, 917, 137 P.2d 500. Intervenor is entitled to recover not only the deposit made on the purchase price but all damages suffered by him by reason of plaintiff's inability to convey, including the amount which he was required to pay as rent for property on which to conduct his business." *Id.* at 652. Our research has not revealed any other case law suggesting uncertainty as to the availability of tort remedies in the case of active concealment once liability is proven. The California Court of Appeals has repeatedly stated that tort damages are available as a remedy to a plaintiff who proves active concealment. Thus, the comment should be withdrawn.

Second, the Committee found the first sentence of the directions for use confusing. It mistakenly suggests that proof of item 1(a) may be a requirement for proving fraud by concealment for each alternative "item 1" included in the instruction. In fact, the sentence led to some confusion during the committee's discussion. As the cases cited in the sources and authority make plain, each alternative "item 1" is an independent basis on which to find fraud whether or not a fiduciary relationship is proven. The first sentence apparently was added to address comments from *LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336-37 regarding the type of transactions or relationships, other than a fiduciary relationship, that may be required in connection with a claim of fraud by concealment. Thus, we suggest that the first sentence be modified as follows: "Under the second, third and fourth bracketed instructions under element 1, if the defendant asserts that there was no relationship based on a transaction giving rise to a duty to disclose, separate and apart from any alleged fiduciary relationship, then the jury should be instructed to determine whether the required relationship existed. *See LiMandri v. Judkins* (1997) 52 Cal.App.4th 326, 336-37.

INSURANCE LITIGATION

2308. Rescission for Misrepresentation or Concealment in Insurance Application–Essential Factual Elements (*Revised 2004*)

[Name of insurer] claims that no insurance contract was created because *[name of insured]* [concealed an important fact/made a false representation] in [his/her/its] application for insurance. To establish this claim, *[name of insurer]* must prove all of the following:

1. That *[name of insured]* submitted an application for insurance with *[name of insurer]* ;

2. That in the application for insurance *[name of insured]* [intentionally] [failed to state/represented] that [insert omission or alleged misrepresentation];

3. [That the application asked for that information;]

4. That *[name of insured]* [*select one of the following*:] [knew that [*insert omission*];] [knew that this representation was not true;]

5. That *[name of insurer]* would not have issued the insurance policy if *[name of insured]* had stated the true facts in the application;

6. That *[name of insurer]* gave *[name of insured]* notice that it was rescinding the insurance policy; and

7. That *[name of insurer]* [returned/offered to return] the insurance premiums paid by *[name of insured]*.

Directions for Use

Use the bracketed word "intentionally" for cases involving Insurance Code section 2071.

Element 3 applies only if plaintiff omitted information, not if he or she misrepresented information. Elements 5 and 6 may be resolved by the language of the complaint, in which case these could be decided as a matter of law. (Civ. Code, § 1691.)

If the insured's misrepresentation or concealment in the insurance application is raised as an affirmative defense by the insurer, this instruction may be modified for use. The elements of the defense would be the same as stated above.

If it is alleged that omission occurred in circumstances other than a written application, this instruction should be modified accordingly.

- Civil Code section 1689(b)(1) provides that a party may rescind a contract under the following circumstances: "If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party."

- Insurance Code section 650 provides: "Whenever a right to rescind a contract of insurance is given to the insurer by any provision of this part such right may be exercised at any time previous to the commencement of an action on the contract. The rescission shall apply to all insureds under the contract, including additional insureds, unless the contract provides otherwise."

- Insurance Code section 330 provides: "Neglect to communicate that which a party knows, and ought to communicate, is concealment."

- Insurance Code section 331 provides: "Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance."

- Insurance Code section 332 provides: "Each party to a contract of insurance shall communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract and as to which he makes no warranty, and which the other has not the means of ascertaining."

- Insurance Code section 334 provides: "Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries."

- Insurance Code section 338 provides: "An intentional and fraudulent omission, on the part of one insured, to communicate information of matters proving or tending to prove the falsity of a warranty, entitles the insurer to rescind."

- Insurance Code section 359 provides: "If a representation is false in a material point . .. the injured party is entitled to rescind the contract from the time the representation becomes false."

- "When the [automobile] insurer fails . . . to conduct ... a reasonable investigation [of insurability] it cannot assert ... a right of rescission" under section 650 of the Insurance Code as an affirmative defense to an action by an injured third party. (*Barrera v. State Farm Mutual Automobile Insurance Co.* (1969) 71 Cal.2d 659, 678 [79 Cal.Rptr. 106, 456 P.2d 674].)

- "[An insurer has a right to know all that the applicant for insurance knows regarding the state of his health and medical history. Material misrepresentation or concealment of such facts [is] grounds for rescission of the policy, and an actual intent to deceive need not be shown. Materiality is determined solely by the probable and reasonable effect [that] truthful answers would have had upon the insurer. The fact that the insurer has demanded answers to specific questions in an application for insurance is in itself usually sufficient to establish materiality as a matter of law." (*Thompson v. Occidental Life Insurance Co. of California* (1973) 9 Cal.3d 904, 915-916 [109 Cal.Rptr. 473, 513 P.2d 353], internal citations omitted.)

- "[I]f the applicant for insurance had no present knowledge of the facts sought, or failed to appreciate the significance of information related to him, his incorrect or incomplete responses would not constitute grounds for rescission. Moreover, '[questions] concerning illness or disease do not relate to minor indispositions but are to be construed as referring to serious ailments which undermine the general health.' Finally, as the misrepresentation must be a material one,' incorrect answer on an insurance application does not give rise to the defense of fraud where the true facts, if known, would not have made the contract less desirable to the insurer.' And the trier of fact is not required to believe the 'post mortem' testimony of an insurer's agents that insurance would have been refused had the true facts been disclosed." (*Thompson, supra*, 9 Cal.3d at p. 916, internal citations omitted.)

- "[T]he burden of proving misrepresentation [for purposes of rescission] rests upon the insurer." (*Thompson, supra*, 9 Cal.3d at p. 919.)

- "The materiality of a representation made in an application for a contract of insurance is determined by a subjective standard (*i.e.*, its effect on the particular insurer to whom it was made) and rescission will be allowed even though the misrepresentation was the result of negligence or the product of innocence. On the other hand, in order to void a policy based upon the insured's violation of the standard fraud and concealment clause ..., the false statement must have been knowingly and wilfully made with the intent (express or implied) of deceiving the insurer. The materiality of the statement will be determined by the objective standard of its effect upon a reasonable insurer." (*Cummings v. Fire Insurance Exchange* (1988) 202 Cal.App.3d 1407, 1415, fn.7 [249 Cal.Rptr. 568], italics in original, internal citation omitted.)

- "Cancellation and rescission are not synonymous. One is prospective, while the other is retroactive." (*Fireman's Fund American Insurance Co. v. Escobedo* (1978) 80 Cal.App.3d 610, 619 [145 Cal.Rptr. 785].)

- "[U]pon a rescission of a policy of insurance, based upon a material concealment or misrepresentation, all rights of the insured thereunder (except the right to recover any consideration paid in the purchase of the policy) are extinguished . . . ." (*Imperial Casualty & Indemnity Co. v. Sogomonian* (1988) 198 Cal.App.3d 169, 184 [243 Cal.Rptr. 639].)

- "The consequence of rescission is not only the termination of further liability, but also the restoration of the parties to their former positions by requiring each to return whatever consideration has been received. . . . [T]his would require the refund by [the insurer] of any premiums and the repayment by the defendants of any proceed advance which they may have received." (*Imperial Casualty & Indemnity Co., supra*, 198 Cal.App.3d at p. 184, internal citation omitted.)

Secondary Sources

2 California Insurance Law & Practice, Ch. 8, The Insurance Contract, § 8.10[1] (Matthew Bender)

2 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) Rescission and Reformation, §§ 21.2-21.12, 21.35-21.37, pp. 757- 764, 785-786

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) 5:143-5:146, 5:153-5:159.1, 5:160-5:287, 15:241-15:256, pp. 5-27-5-28, 5-30-5-32, 5-32.1-5-54, 15-42-15-44

2 California Uninsured Motorist Law, Ch. 24, Bad Faith in Uninsured Motorist Law, § 24.40 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, Insurance (Matthew Bender)

12 California Points and Authorities, Ch. 120, Insurance, §§ 120.250- 120.251, 120.260 (Matthew Bender)

GIVEN:

REFUSED:

MODIFIED:

WITHDRAWN:

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Judge

State Bar Committee's Comments on Proposed Instruction No. 2308

In the Committee's response of March 10, 2004, it expressed certain recommendations and concerns relating to Instruction No. 2308 as then proposed. The Judicial Council adopted only one of the Committee's recommendations and the Committee, although not unanimous in its views, wishes to reiterate it concerns regarding this instruction. The concerns expressed were as follows:

- *First, concern continues to exist over combining misrepresentation and concealment into one instruction. It should be clear from the pleadings or evidence whether only one or both defenses are asserted. Separate instructions are needed for each defense because negligent concealment is a defense under Insurance Code 331, while misrepresentation requires scienter (Ins. code section 338.) In addition, the duties to answer truthfully specific questions asked and to provide (regardless of whether asked) facts necessary and material to evaluating the risk sometimes invoke different principles.*

- *Second, concern continues to exist as to Element 5. The instruction says that the insurer must show that it would not have issued the policy. But the case law holds that materiality may be established if the insurer either would have declined to issue the policy, or would have issued the policy with different policy terms, or would have issued the policy for a higher premium. See, e.g., Wilson, supra, 235 Cal.App.3d at 994-995; Old Line Life, supra, 229 Cal.App.3d at 1604; Imperial Casualty, supra, 198 Cal.App.3d at 180-181. The correct instruction should say the insurer would not have issued the policy "on the same terms and conditions."*

- *Finally, because the reference to Insurance Code section 2071 is somewhat unclear in the Directions for Use, we suggest adding the following to the end of the sentence: "which sets out the Standard form Fire Policy that contains a clause regarding Concealment, Fraud stating "The entire policy shall be void if ... the insured has willfully concealed or misrepresented...."*

INSURANCE LITIGATION

2336. Bad Faith-Unreasonable Failure to Defend-Essential Factual Elements (*New 2004*)

[Name of plaintiff] claims [he/she/it] was harmed by *[name of defendant]*'s breach of the obligation of good faith and fair dealing because it failed to defend *[name of plaintiff]* in a lawsuit that was brought against [him/her/it]. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of plaintiff]* was an insured under ~~an~~ a liability insurance policy with *[name of defendant]*;

2. That a lawsuit was brought against *[name of plaintiff]*;

3. That *[name of plaintiff]* gave *[name of defendant]* timely notice that [he/she/it] had been sued and requested *[name of defendant]*'s defense;

4. That *[name of defendant]* refused to defend *[name of plaintiff]* against the lawsuit;

5. That *[name of defendant]*'s refusal was unreasonable in light of its duty to defend a potentially covered claim;

6. That *[name of plaintiff]* was harmed; and

7. That *[name of defendant]*'s conduct was a substantial factor in causing *[name of plaintiff]*'s harm.

Directions for Use

The instructions in this series assume the plaintiff is ~~the~~an insured and the defendant is the insurer. Issue No. 1 should only be given if there is a factual issue as to the plaintiff being an insured under the policy. The party designations may be changed if appropriate to the facts of the case.

This instruction also assumes the judge will decide the issue of whether the claim was potentially covered by the policy. If there are factual disputes regarding this issue, a special interrogatory could be used.

For instructions regarding general breach of contract issues, refer to the Contracts series (Instruction 300, et seq.).

If it is alleged that a demand was made in excess of limits and there is a claim that the defendant should have contributed the policy limits, then this instruction will need to be modified. Note that an excess insurer generally owes no duty to defend without exhaustion of the primary coverage by judgment or settlement.

- " '[T]he insurer must defend in some lawsuits where liability under the policy ultimately fails to materialize; this is one reason why it is often said that the duty to defend is broader than the duty to indemnify.' The duty to defend is a continuing one which arises on tender of the defense and lasts either until the conclusion of the underlying lawsuit or until the insurer can establish conclusively that there is no potential for coverage and therefore no duty to defend. The obligation of the insurer to defend is of vital importance to the insured.' In purchasing his insurance the insured would reasonably expect that he would stand a better chance of vindication if supported by the resources and expertise of his

insurer than if compelled to handle and finance the presentation of his case. He would, moreover, expect to be able to avoid the time, uncertainty and capital outlay in finding and retaining an attorney of his own.' 'The insured's desire to secure the right to call on the insurer's superior resources for the defense of third party claims is, in all likelihood, typically as significant a motive for the purchase of insurance as is the wish to obtain indemnity for possible liability.' " (*Amato v. Mercury Casualty Co. (Amato II)* (1997) 53 Cal.App.4th 825, 831-832 [61 Cal.Rptr.2d 909], internal citations omitted.)

- "An anomalous situation would be created if, on the one hand, an insured can sue for the tort of breach of the implied covenant if the insurer accepts the defense and later refuses a reasonable settlement offer, but, on the other hand, an insured is denied tort recovery if the insurer simply refuses to defend ... This dichotomy could have the effect of encouraging an insurer to stonewall the insured at the outset by simply refusing to defend." (*Campbell v. Superior Court* (1996) 44 Cal.App.4th 1308, 1319-1320 [52 Cal.Rptr.2d 385].)

- "In order to rely on an insured's lack of notice an insurer bears the burden of demonstrating that it was substantially prejudiced." (*Select Insurance Co. v. Superior Court (Custer)*)(1990) 226 Cal.App.3d 631, 636 [276 Cal.Rptr. 598], internal citations omitted.)

- "In our view ... an insurer is not allowed to rely on an insured's failure to perform a condition of a policy when the insurer has denied coverage because the insurer has, by denying coverage, demonstrated performance of the condition would not have altered its response to the claim. (*Select Ins. Co., supra*, Cal.App.3d at p. 637.)

- "A breach of the implied covenant may be predicated on the insurer's breach of its duty to defend the insured, though the insurer's conduct in such cases is commonly coupled with the breach of other aspects of the implied covenant, such as the duty to settle or to investigate The broad scope of the insurer's duty to defend obliges it to accept the defense of 'a suit which potentially seeks damages within the coverage of the policy . . . .' A breach of the duty to defend in itself constitutes only a breach of contract, but it may also violate the covenant of good faith and fair dealing where it involves unreasonable conduct or an action taken without proper cause. On the other hand, '[i]f the insurer's refusal to defend is reasonable, no liability will result.' (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 881 [93 Cal.Rptr.2d 364]

GIVEN:

REFUSED:

MODIFIED:

WITHDRAWN:

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Judge

State Bar Committee's Comments on Proposed Jury Instruction No. 2236

The Committee recommends that the word "an" be inserted before "insured" and that "liability" be inserted before "insurance" to make clear that the duty to defend only arises in the context of liability insurance coverage and that it is not necessary that the insured be the named insured in

the policy.

In addition, the Committee recommends that the Direction for Use indicate that issue No. 1 only be included when there is a factual dispute under the policy.

CONCLUDING INSTRUCTIONS

5000. Duties of the Judge and Jury (*Revised 2004*)

Members of the jury, you have now heard all the evidence [and the closing arguments of the attorneys]. [The attorneys will have one last chance to talk to you in closing argument. But before they do, it] [It] is my duty to instruct you on the law that applies to this case. ~~You must continue~~It is your duty to follow ~~the~~these instructions ~~I~~as well as those that I previously have given ~~you up~~ to ~~this point~~you. You will have a copy of my instructions with you when you go to the jury room to deliberate. [I have provided each of you with your own copy of the instructions.] [I will display each instruction on the screen.]

You must decide what the facts are. You must consider all the evidence and then decide what you think happened. You must decide the facts based on the evidence admitted in this trial. Do not do any research on your own or as a group. Do not use dictionaries, the Internet, or other reference materials. Do not investigate the case or conduct any experiments. Do not contact anyone to assist you, such as a family accountant, doctor, or lawyer. Do not visit or view the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate. All furors must see or hear the same evidence at the same time. [Do not read, listen to, or watch any news accounts of this trial.] You must not let bias, sympathy, prejudice, or public opinion influence your decision.

I will now tell you the law that you must follow to reach your verdict. You must follow the law exactly as I give it to you, even if you disagree with it. If the attorneys [have said/say] anything different about what the law means, you must follow what I say.

In reaching your verdict, do not guess what I think your verdict should be from something I may have said or done.

Pay careful attention to all the instructions that I give you. All the instructions are important because together they state the law that you will use in this case. You must consider all of the instructions together.

After you have decided what the facts are, you may find that some instructions do not apply. In that case, follow the instructions that do apply and use them together with the facts to reach your verdict.

If I repeat any ideas or rules of law during my instructions, that does not mean that these ideas or rules are more important than the others are. In addition, the order of the instructions does not make any difference.

[Most of the instructions are typed. However, some handwritten or typewritten words may have been added, and some words may have been deleted. Do not discuss or consider why words may have been added or deleted. Please treat all the words the same, no matter what their format. Simply accept the instruction in its final forma

Directions for Use

As indicated by the brackets in the first paragraph, this instruction can be read either before or after closing arguments. The Advisory Committee recommends that this instruction be read to the jury before reading instructions on the substantive law.

Sources and Authority

- Code of Civil Procedure section 608 provides that "[i]n charging the jury the court may

state to them all matters of law which it thinks necessary for their information in giving their verdict." It also provides that the court "must inform the jury that they are the exclusive judges of all questions of fact." (See also Code Civ. Proc., § 592.)

- Evidence Code section 312(a) provides that "[e]xcept as otherwise provided by law, where the trial is by jury [a]ll questions of fact are to be decided by the jury."

- An instruction to disregard any appearance of bias on the part of the judge is proper. (Gist v. French (1955) 136 Cal.App.2d 247, 257-259 [288 P.2d 1003], disapproved on other grounds in *Deshotel v. Atchinson, Topeka & Santa Fe Ry. Co.* (1958) 50 Cal.2d 664, 667 [328 P.2d 449] and *West v. City of San Diego* (1960) 54 Cal.2d 469, 478-479 [6 Cal.Rptr. 289, 353 P.2d 929].)

- Jurors must avoid bias: " 'The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to trial by jury guaranteed by the constitution.' [Citations.]" (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 110 [95 Cal.Rptr. 516, 485 P.2d 1132].) Evidence of racial prejudice and bias on the part of jurors amounts to misconduct and may constitute grounds for ordering a new trial. (Ibid.)

- An instruction to consider all the instructions together can help avoid instructional errors of conflict, omission, and undue emphasis. (*Escamilla v. Marshburn Brothers* (1975) 48 Cal.App.3d 472, 484 [121 Cal.Rptr. 891].)

- Providing an instruction stating that, depending on what the jury finds to be the facts, some of the instructions may not apply can help avoid reversal on the grounds of misleading jury instructions. (See *Rodgers v. Kemper Construction Co.* (1975) 50 Cal.App.3d 608, 629-630.)

- In *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 57-59 [118 Cal.Rptr. 184, 529 P.2d 608], the Supreme Court held that the giving of cautionary instructions stating that no undue emphasis was intended by repetition and that the judge did not intend to imply how any issue should be decided should be considered in weighing the net effect of the instructions on the jury.

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, § 268

4 California Trial Guide, Unit 91, Jury Deliberations and Rendition of Verdict, § 91.20.

28 California Forms of Pleading and Practice, Ch. 326, Jury Instructions, § 326.21 (Matthew Bender)

GIVEN:

REFUSED:

MODIFIED:

WITHDRAWN:

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Judge

State Bar Committee Comments on Proposed Instruction No. 5000.

The Committee believes the wording in the first paragraph is stilted and confusing. We have suggested a slightly different wording.

CONCLUDING INSTRUCTIONS

5009. Predeliberation Instructions (*Revised 2004*)

When you go to the jury room, the first thing you should do is choose a presiding juror. The presiding juror should see to it that your discussions are orderly and that everyone has a fair chance to be heard.

It is your duty to talk with one another in the jury room and to consider the views of all the jurors. Each of you must decide the case for yourself, but only after you have considered the evidence with the other members of the jury. Feel free to change your mind if you are convinced that your position should be different. You should all try to agree. But do not give up your honest beliefs just because the others think differently.

Please do not state your opinions too strongly at the beginning of your deliberations. Also, do not immediately announce how you plan to vote. Keep an open mind so that you and your fellow jurors can easily share ideas about the case.

You should use your common sense, but do not use or consider any special training or unique personal experience that any of you have in matters involved in this case. Such training or experience is not a part of the evidence received in this case.

Sometimes jurors disagree or have questions about the evidence or about what the witnesses said in their testimony. If that happens, you may ask to have testimony read back to you or ask to see ~~the~~ any exhibits admitted into evidence that have not already been provided to you. Also, jurors may need further explanation about the laws that apply to the case. If this happens during your discussions, write down your questions and give them to the clerk or bailiff. I will do my best to answer them. When you write me a note, do not tell me how you voted on an issue until I ask for this information in open court.

[At least nine jurors must agree on each verdict and on each question that you are asked to answer. However, the same jurors do not have to agree on each verdict or each question. Any nine jurors are sufficient. As soon as you have agreed on a verdict and answered all the questions as instructed, the presiding juror must date and sign the form(s) and notify the clerk or the bailiff.]

Your decision must be based on your personal evaluation of the evidence presented in the case. Each of you may be asked in open court how you voted on each question.

While I know you would not do this, I am required to advise you that you must not base your decision on chance, such as a flip of a coin. If you decide to award damages, you may not agree in advance to simply add up the amounts each juror thinks is right and then make the average your verdict.

You may take breaks, but do not ~~resume your discussions~~ discuss this case with anyone, including each other, until all of you are back in the jury room.

Directions for Use

The Advisory Committee recommends that this instruction be read to the jury after closing arguments and after reading instructions on the substantive law.

The sixth paragraph is bracketed because this point appears in the special verdict form instructions. Read if the special verdict instruction (*Instruction 5012, Introduction to Special-Verdict Form*) is not also being read.

Judges may want to provide each juror with a copy of the verdict forms so that the jurors may keep track of how they vote using this copy. Jurors can be instructed that this copy is for their personal use only and that the presiding juror will be given the official verdict form to record the jury's decision. Judge may also want to advise jurors that they may be polled in open court regarding their individual verdicts.

Delete reference to reading back testimony in cases where the proceedings are not being recorded.

Sources and Authority

Code of Civil Procedure section 613 provides, in part: "When the case is finally submitted to the jury, they may decide in court or retire for deliberation; if they retire, they must be kept together, in some convenient place, under charge of an officer, until at least three-fourths of them agree upon a verdict or are discharged by the court."

Code of Civil Procedure section 614 provides: "After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the parties or counsel."

Code of Civil Procedure section 618 and article I, section 16, of the California Constitution provide that three-fourths of the jurors must agree to a verdict in a civil case.

The prohibition on chance or quotient verdict is stated in Code of Civil Procedure section 657, which provides that a verdict may be vacated and a new trial ordered "whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance." (See also *Chronakis v. Windsor* (1993) 14 Cal.App.4th 1058, 1064-1065 [18 Cal.Rptr.2d 106].)

Jurors should be encouraged to deliberate on the case. (*Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905, 911 [64 Cal.Rptr.2d 492].)

The jurors may properly be advised of the duty to hear and consider each other's arguments with open minds, rather than preventing agreement by stubbornly sticking to their first impressions. (*Cook v. Los Angeles Ry. Corp.* (1939) 13 Cal.2d 591, 594 [91 P.2d 1 18].)

Secondary Sources

7 Witkin, California Procedure (4th ed. 1997) Trial, §§ 330, 336

4 California Trial Guide, Unit 91, Jury Deliberations and Rendition of Verdict, § 91.01 (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326, Jury Instructions, § 326.32, Ch. 326A, Jury Verdicts, § 326A.14 (Matthew Bender)

GIVEN:

REFUSED:

MODIFIED:

WITHDRAWN:

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Judge

State Bar Committee's Comments on Proposed Instruction No. 5009

The Committee recommends that if the Court provides verdict forms to each juror it instructs the jurors that those forms will be collected and given to the clerk for destruction before dismissing the jury. To allow the jurors to take their individual forms out of the courtroom after deliberation can only lead to potential attacks on the jury verdict or unwarranted publicity.